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No. 85-718

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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AMERICAN METHYL CORPORATION,
PETITIONER

v.

THE MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., ET AL.

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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# PETITIONER'S REPLY BRIEF

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## I

The question before this Court goes much deeper than the EPA and the Association have admitted. In fact, they have presented questions which do not even address the real issue. The question is not whether the second panel of the court of appeals erred in its review of an earlier EPA Administrator's waiver of the prohibition to sell petitioner's fuel in commerce. The real question is whether the present Administrator and the

Association can avoid the statutory safeguards of Section 211(c) and have a fuel removed from commerce under the guise of a ruling that the waiver should not have been granted in the first place. It must be understood that the sole purpose of this case from the beginning has been to remove petitioner's fuel from commerce without petitioner having had the protection and the safeguards of a Section 211(c) proceeding.

The first panel of the court of appeals held that once a fuel has been introduced into commerce the sole means for its control or prohibition is by the procedure set forth in Section 211(c). American Methyl Corp. v. E.P.A., 749 F.2d 826, 831, 836 (D.C. Cir. 1984):

> We hold that the Administrator may not revoke the Petrocoal waiver pursuant to Section 211(f), but may forbid the marketing of Petrocoal only pursuant to his authority to control or prohibit fuel and fuel additives under Section 211(c).
>
> * * * section 211(f), which does not admit the existence of a revocation procedure, not surprisingly fails to regulate the conduct of such proceedings. If Section 211(f) is construed as EPA would have it, no particular substantive or procedural requirements (apart from whatever procedural minima may be required by the Constitution's due process clause) need be followed.
>
> * * * *

> * * * Thus, while Congress may have wanted the Administrator to correct his mistakes, it provided a mechanism sufficient to this task in section 211(c). It further understood this mechanism as the exclusive means by which he was to correct waivers mistakenly granted by default. We therefore see no need to imply authority under section 211(f) to reconsider waivers granted after due deliberation. What suffices to correct waivers mistakenly granted by default should also suffice to correct the (hopefully) far smaller proportion of waivers mistakenly granted after careful consideration.

The importance of review in the case now before the Court is a matter of life or death to the petitioner because the EPA has informed petitioner's president and at least three of petitioner's customers that upon receipt of the mandate in this case the EPA will not control or prohibit the marketing of Petrocoal in proceedings required by Section 211(c) as mandated in the first panel's decision, but will interpret the second panel's decision as having effectively removed Petrocoal from commerce. The supposed theory for this interpretation is that Petrocoal was never introduced into commerce because the waiver granted by the Administrator in 1981 was vacated by the second panel of the court of appeals in this case in 1985. (Affidavit of Ronald E. Eames attached hereto as Appendix A.)

II

The opposition of the Association and EPA is based upon the erroneous assertion that there is statutory authority for judicial review of the granting of the Petrocoal waiver. The Association asserts that the review was "fully consistent with the applicable provisions of the Clean Air Act." (Br. 5.) The EPA asserts that "Congress fully intended that rulings on waivers under Section 211(f)(4) would be subject to judicial review. (Br. 7.) Such is not the case.

The Clean Air Act contains specific provisions for judicial review of only specified actions of the Administrator. The statutory scheme of the Clean Air Act shows that Congress intended to preclude judicial review of the granting of a waiver.

The provisions and limitations for judicial review of actions under the Clean Air Act are set forth in subsections (b) and (e) of Section 307 (42 U.S.C. § 7607)(b)). Section 307(b) describes various kinds of actions under the different sections of the statute that can be reviewed and is reproduced in full in the Appendix B to this brief.

The judicial review authority with regard to the entire Clean Air Act is in Section 307(b) (42 U.S.C. § 7607(b)). The review authority for actions taken under sections which are not involved in this case are:

> any emission standard or requirement under section 7412;
>
> any standard of performance or requirement under section 7411;
>
> any standard under section 7521;
>
> any determination under section 7521(b)(5).

However, the review authority with regard to actions taken under Section 211 (42 U.S.C. § 7545) is limited to "any control or prohibition." The pertinent language is as follows:

> (b) Judicial review
>
> (1) A petition for review of action of the Administrator in promulgating * * * any control or prohibition under section 7545 [Section 211] of this title * * * may be filed only in the United States Court of Appeals for the District of Columbia. * * *

Although the Administrator's actions under Section 211 include the issuance of waivers (subsection (f)) as well as the imposition of controls and prohibitions (subsection (c)), it is only the controls and prohibitions that are subject to judicial review. Subsection 211(c)

specifically speaks of the "control or prohibition" of fuels in commerce and provides for specific proceedings by the Administrator to accomplish such "control or prohibition." No such language is used in speaking of the waiver of fuel into commerce under subsection 211(f). The granting of a waiver is not a "control or prohibition."

The only place other than Section 307(b) where the words "control" and "prohibition" are used is in Section 211(c) (42 U.S.C. § 7545(c)) which reads in pertinent part as follows:

> (c) Offending fuels and fuel additives; control; prohibition.
>
> (1) The Administrator may * * * control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle * * *.

The words "control" and "prohibition" are also used in subsections 211(c)(2)(A), 211(c)(2)(B) and 211(c)(2)(C). (See Appendix G to the petition.)

It is clear that by the specific language of the judicial review provisions of Section 307(b), Congress confined the judicial review of actions under Section 211 to those of control or prohibition and thereby excluded review of the granting of waivers.

The Solicitor General refers at pages 2 and 7 of the EPA brief to Section 211(f)(5) as the authority for judicial review of waivers. Section 211(f)(5) reads as follows:

> No action of the Administrator under this section may be stayed by any court pending judicial review of such action.

Section 211(f)(5) merely provides that where review is permitted an action of the Administrator may not be stayed pending such review. That section does not include the word "waiver" as would appear from page 2 of the Solicitor General's brief.

To make it clear that no general judicial review authority exists apart from Section 307(b), subsection (e) of Section 307 provides as follows:

> Nothing in this chapter shall be construed to authorize judicial review of regulations or order of the Administrator under this chapter, except as provided in this section.

III

Because of the lack of jurisdiction to review the waiver and the threatened refusal of EPA to comply with Section 211(c) as directed by the decision of the first panel, the need for review of the second panel's decision

is indisputable. In the absence of review, petitioner requests a summary remand with directions to dismiss the case for lack of jurisdiction.

Respectfully submitted,

Dale E. Anderson

Claron C. Spencer

January 3, 1986

# APPENDIX A

## AFFIDAVIT OF RONALD E. EAMES

STATE OF UTAH )
) ss.
COUNTY OF SALT LAKE )

Ronald E. Eames, being first duly sworn, does upon oath state as follows:

1. I am the President of American Methyl Corporation, a Utah Corporation, Petitioner before this Court.

2. After the decision of the Circuit Court of Appeals was rendered in this matter, I was in a meeting held at the offices of Mr. Richard Koslowski, Director of Enforcement for the Federal Environmental Protection Agency, Washington, D.C. There were present at said meeting the following persons:

Richard Koslowski; Ralph Colleli, legal counsel for EPA; James Caldwell; Scott Stone, legal counsel for American Methyl; myself and possibly David Dearing, legal counsel for the Justice Department.

3. In response to a question by myself concerning EPA participation in a test program subsequent to the issuance of the mandate in this case, Richard Koslowski

stated that under no circumstances would Petrocoal be allowed to be sold commercially after the mandate was issued.

4. Ralph Colleli, legal counsel for EPA, stated, in effect, that as far as EPA was concerned, the Court of Appeals had imposed upon EPA the requirement to prohibit the sale of Petrocoal by vacating the waiver.

Dated this 2nd day of January 1986.

Ronald E. Eames

Subscribed and sworn to by Ronald E. Eames before me this 2nd day of January 1986.

Notary Public
Residing in Salt Lake County,
Utah

My commission expires:

11-9-88

# APPENDIX B

Section 307(b) of the Clean Air Act, 42 U.S.C. § 7607(b)

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412(c) of this title, under section 7413(d)of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter 1 of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District

of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

* * * *

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.